SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 763

BERNHARD ROSEE,

Petitioner

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; **JAMES E. BAGGOT, JR.,** and **DONALD W. MORRISON,** individually and d/b/a **BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO,** and **THOMAS HERR,** individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; **JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW,** individually and as President of the Board of Trade of the City of Chicago; **WARREN W. LEBECK,** individually and as Secretary of the Board of Trade of the City of Chicago; **JAMES J. COUGHLIN; ALBERT W. KIBBY;** and **SAM GORDON,**

Respondents

~~MOTION FOR LEAVE TO FILE~~ PETITION FOR REHEARING OF ORDER DENYING CERTIORARI AND PETITION FOR REHEARING

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BOARD OF TRADE OF THE CITY OF CHICAGO, et al.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant rehearing of its order of January 20, 1969, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case (Pet. for Certiorari, App. 4-5).

1. The Relevant Facts

Focusing the issue requires stripping the facts to essentials. Petitioner, a commodities trader, sued in the Circuit Court of Cook County, Illinois, alleging that he had been defrauded by the brokerage house of Baggot and Morrison and that the Board of Trade of the City of Chicago, its arbitration committee and Commodities Exchange Authority

agents Kibby and Gordon, were parties to a conspiracy to conceal the fraud (App. 1-14, 30-31, 33-34). The alleged modus operandi of the fraud was to induce petitioner to execute trades on behalf of Baggot and Morrison (saving the brokers' commission), some of which Baggot and Morrison would eventually charge to Rosee's account if unprofitable, or to their own house account, or the account of others, if profitable (App. 117, 127).

The entire scheme having been concealed from petitioner (App. 41),[1] his claim could be proved or disproved only by comparison of Baggot and Morrison's ledgers and records over the entire period from January, 1958 to November, 1960, with their daily transaction reports to the Commodity Exchange Authority (CEA) over that period (App. 118). The Commodity Exchange Act,[2] Sections 1.32, 1.35, 1.37, 17.00, and regulations promulgated by the Secretary of Agriculture pursuant to Section 12 thereof, require that these reports, reflecting the account of each trader by name, be filed with the CEA each trading day. See *Freeman v. Seligson,* F.2d , No. 20,478, App. D.C., decided June 28, 1968, slip op., p. 3.

Kibby and Gordon removed the case to the United States District Court and moved to dismiss as to themselves on the ground of official immunity. The other defendants moved for remand to the state court on the ground that, with Kibby and Gordon out of the case, the predicate of federal jurisdiction fell (App. 30-32).

The District Court held that "the legal defenses relied upon by the government are insufficient to warrant dismissal as a matter of law" (App. 32, 98-103), and therefore denied

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[1]The District Court found that Rosee did not, but "should have received daily advices from Baggot and Morrison" (App. 49, n. 1).

[2]49 Stat. 1491, 7 U.S.C. § 1 to 17 a.

the motions to dismiss and to remand. The Court also rejected the Government's claim that the daily transaction reports filed with CEA, which plaintiff had subpoenaed, were privileged (35 F.R.D. 512; 36 F.R.D. 684, 687, 688, 691). Accord: *Freeman v. Seligson,* F.2d , No. 20,478, App. D.C., decided June 28, 1968 (Leventhal and Bazelon, JJ.).

On the basis of *in camera* inspection of three random daily reports which had been submitted to the Court by CEA (Brief for the Government in Opposition, p. 9), the Court, on February 16, 1965, over the Government's vigorous opposition, ordered CEA to produce the daily reports for relevant dates which, the Court assumed, petitioner would be able to specify after he had completed discovery of other documents the Court ordered produced (36 F.R.D. at 691). Production was ordered of the daily transaction reports "subject to the requirement that plaintiff specify particular dates shown to be relevant" (*ibid.*).

Before petitioner completed discovery of the other documents, and before petitioner had specified any dates as required (Supp. App. 95-98; 102, fol. 23-24), the Court, *sua sponte,* on May 18, 1965, ordered "discovery on the question of jurisdiction closed" (App. 24).[3] On June 9, 1965, Kibby and Gordon filed a motion for summary judgment (App. 17-22), which the Court granted on June 13, 1966 (App. 29). The court then concluded "that the principles of limited federal jurisdiction require * * * remanding the balance of this case to the state court" (App. 131) and entered a remand order (App. 30). The Court of Appeals held this disposition "supported by * * * the law appertaining thereto" (Pet. for Certiorari, App. 4).

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[3] Assertion in the Government's Brief in Opposition, p. 9, that "There is nothing to show that this order was not complied with" is misleading, because compliance was not required until the condition precedent was satisfied. There is nothing to suggest that petitioner was afforded opportunity to, much less that he did, satisfy the condition.

The District Court apparently closed discovery on "the question of jurisdiction," *i.e.*, the merits of the claim against Kibby and Gordon, on the theory that the uncompleted discovery could not affect resolution of that question (App. 98-103). The Court appears to have assumed that the merits of the claim against Kibby and Gordon were so discrete from the merits of the basic fraud charge that the former could be adjudicated without reaching the merits of issues involving the latter (36 F.R.D. 684, 687, 689; Supp. App. 99, Supp. App. 102, fol. 25-26; App. 98-103). The Court noted that discovery thus far "has disclosed only a small portion of the information which must be explored before each of the many charges of improper conduct by the other defendants can be resolved to any degree of certainty" (App. 33, 131).

However, the Court's exhaustive opinion, while purporting to eschew adjudication of the merits of the fraud claim (App. 54, 62, 104-105), actually does consider and adjudicate essential elements of that claim.[4] Throughout the

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[4] Thus, the District Court found that "during October, 1959, in particular, Rosee's open trades were suffering substantial losses resulting in deficits which continued to mount * * *" (App. 38, n. 2); "Baggot and Morrison permitted Rosee to maintain his open trading position in the face of substantial potential deficits" (*ibid.*); "In point of fact, Rosee [on August 7, 1959] * * * had absolutely nothing" (App. 52); "Rosee's own accounts continued to have a deficit balance" (*ibid.*); "The trade [in "Account 45" on September 14, 1959] was * * * treated [by Baggot & Morrison] as a customer's trade rather than a 'house' trade" (App. 54); "It is equally possible to infer that the Baggot and Morrison employees preparing the position journal included the Account # 35 trade on Rosee's sheet because they understood that this was Rosee's account" (App. 58); "On * * * [October 1], Rosee executed several trades in the # 35 account" (App. 59) (Rosee's contention being that he executed these trades at the request and on behalf of Morrison) (cf. App. 63, par. IV-31, last two lines); the transactions in Account # 35, "undeniably involve[d] Rosee's account" (App. 61); "Rosee had some knowledge of Account # 35" (App. 62); "While the # 35 was added by someone in Baggot and Morrison's office, there is no

opinion, in this context, inference and speculation substitute for findings based on evidence which could have been obtained only through, and after, discovery.[5]

The opinion, moreover, explicitly recognizes that disposition of the Kibby and Gordon motion for summary

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suggestion that the trade was intended to be made in Rosee's *regular* account * * * " (App. 64) (emphasis added); Rosee's "statements to Piala regarding * * * his belief that the Regular Account deficit was $28,000 are somewhat confusing" (App. 74); "The alleged impropriety of the losses from the November, 1959 liquidation of plaintiff's open position (IV-31) arises only because of the second false assumption made by Rosee: that he had a credit of $75,000 plus in his account in September" (App. 106); "That Rosee could have believed that he had $20,000 (or more) in his accounts when he had exhausted almost all of the credit in his drawing account from 1958 and had consistently incurred losses in trading (IV-8, 11) is somewhat beyond belief" (App. 112).

[5] For example, "The absence of some of these documents may indicate no more than sloppy bookkeeping" (App. 49, n. 1); the available evidence "could indicate that Rosee made the trade or it could indicate that Morrison made the trade, advising Fritz that it was on behalf of Rosee" (App. 54); "It is, of course, apparent that [Baggot and Morrison's] dereliction with regard to '03 reports is inconsequential in determining ownership [of account #35]" (App. 55); "This analysis, of course, assumes that Baggot and Morrison did not cancel the '03 report (and fail to file one on the 14th) for other reasons * * * " (App. 58); "This is apparently the first time Rosee's name was placed on any trading record concerning Account #35" (App. 59); "From the records before the court, the details of trading in Rosee's regular account cannot be determined precisely" (App. 60); these facts "appear to suggest that Rosee had some knowledge of Account #35" (App. 62); "This is not to say that Account #35 in fact belongs to Rosee * * * " (App. 62); Rosee "may have known that his account included debits in these amounts or have been advised of his Regular Account balance as of November 9 which included these debits" (App. 74).

judgment necessarily required consideration of the validity of petitioner's charges against Baggot and Morrison, in part, at least:

> "* * *while the pending motion does not involve the charges levied against Baggot and Morrison, the court is necessarily put to the task of evaluating Rosee's reasoning as to some of the charges levied against them * * *." (App. 104).

This evaluation was made despite the fact that petitioner had been foreclosed from establishing the validity of his basic position by discovery.

The District Court assumed that 28 U.S.C. §1441(c) posed no obstacle to bifurcation of plaintiff's discovery and that adjudication of the merits of the claim against Kibby and Gordon left only a discretionary question, namely, whether the "substantial commitment of judicial resources" justified "retention of the case against the seventeen other defendants" (App. 131). Actually, a quite different, and far more serious question, of constitutional dimensions, is presented.

As we have seen, the District Court found that the merits of the claim against Kibby and Gordon could not be adjudicated without considering and evaluating, in part at least, the validity of plaintiff's claim against Baggot and Morrison. The court proceeded to make that evaluation without having accorded plaintiff the benefit of discovery of documents in the exclusive possession of the CEA which were not merely relevant but indispensable to establishment of his position. For the same reason that "a conviction should not stand when the accused has been denied access to documents relevant to his defense" (*United States v. Grayson*, 166 F.2d 863, 870 (2 Cir.)), a judgment may not stand which entails findings adverse to a party on issues as to which he has been denied discovery of unprivileged material crucial to his underlying claim.

2. Questions Presented

Whether removal procedure permits bifurcation of the merits of a single "case," so as to compel the plaintiff to litigate his claim piecemeal, without the benefit of discovery essential to evaluation of his underlying claim, where at least partial evaluation of that claim is indispensable to adjudication of the "jurisdictional" facet.

3. Reasons For Granting the Writ

This Court has recently reemphasized "that 'the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time.'" *Mine Workers v. Gibbs*, 383 U.S. 715, 723, 725, n. 13. It is certainly inconsistent with that tendency for a federal court to *forbid* the plaintiff "to [discover] his whole cause of action and his whole case at one time." *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 325.

Where, as here, segregation of issues at the discovery stage results in a partial adjudication which necessarily entailed consideration and evaluation of issues as to which discovery was foreclosed, the plaintiff is deprived of opportunity to try his case at one time in either the federal or the state court. Piecemeal adjudication of the merits on bobtailed discovery is bad enough; where, as here, adjudication plainly impinges upon the issues remanded for trial to the state court, the ramifications of *res judicata* (*Gibbs* case, *supra*, 383 U.S. at 724), foreclose the possibility of fair trial of plaintiff's case in the state court.

Having overruled the Kibby-Gordon motion to dismiss for official immunity, the District Court was forbidden, both by the trend of this Court's decisions, and by due process considerations, to separate the *merits* of petitioner's claim against Kibby and Gordon from the *merits* of his claim against Baggot and Morrison and others, at least before

discovery was completed. Remand after partial adjudication of the merits without full discovery deprived petitioner of the right to a fair trial, not only of Kibby and Gordon, but, even more importantly, of the remaining defendants.

The implications of pendent jurisdiction are intricate and complex. This case demonstrates that clarification by this Court is essential to assure that the broad discretion vested in the lower courts thereunder will be exercised consistently with the trend of this Court's decisions and overriding due process limitations.

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioner